

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT GRAY, ET AL

VS.

C.A. NO. 04-312-L

JEFFREY DERDERIAN, ET AL

VS.

HOME DEPOT, INC.

**DEFENDANTS, FOAMEX INTERNATIONAL, INC.,
FOAMEX LP AND FMXI, INC. AND GENERAL FOAM CORPORATION,
GFC FOAM, LLC, PMC, INC. AND PMC GLOBAL, INC.'S
OBJECTION TO PLAINTIFFS' MOTION TO AMEND**

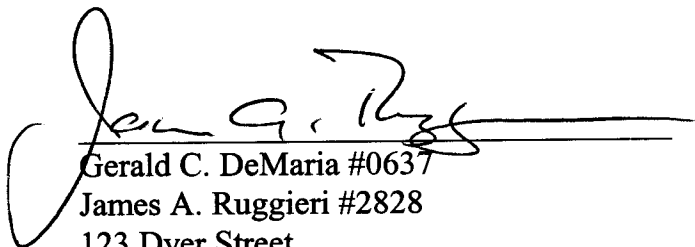
Defendants, Foamex International Inc, Foamex LP and FMXI, Inc. ("Foamex") and General Foam Corporation, GFC Foam, LLC, PMC, Inc. and PMC Global, Inc. ("General Foam") hereby object to Plaintiffs' Motion to Amend. A memorandum of law in support of this objection is filed herewith.

Defendants

FOAMEX INTERNATIONAL, INC., FOAMEX,
LP, FMXI, INC., GENERAL FOAM
CORPORATION, GFC FOAM, LLC, PMC, INC.
AND PMC GLOBAL, INC.

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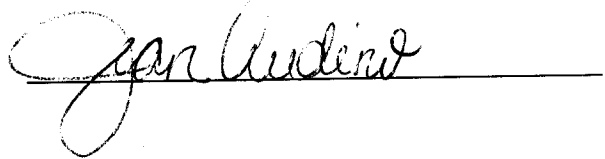
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C.A. NO. 04-312-L

**MEMORANDUM OF DEFENDANTS, FOAMEX INTERNATIONAL, INC.,
FOAMEX LP AND FMXI, INC. AND GENERAL FOAM CORPORATION,
GFC FOAM, LLC, PMC, INC. AND PMC GLOBAL, INC. IN SUPPORT OF
OBJECTION TO PLAINTIFFS' MOTION TO AMEND**

The original Complaint in this matter was filed in the Providence County Superior Court on or about July 22, 2004.¹ The Complaint was subsequently removed to this court. Defendants Foamex International Inc, Foamex LP and FMXI, Inc. ("Foamex") and General Foam Corporation, GFC Foam, LLC, PMC, Inc. and PMC Global, Inc. ("General Foam") filed motions to dismiss the claims made against them in the Complaint on August 27, 2004.² The issues have been fully briefed by both sides. Hearing on all motions to dismiss filed by these defendants is scheduled for December 9, 2004.

¹ Counsel for many of these plaintiffs, however, have been involved in the Station Litigation since shortly after the tragic February 20, 2003 fire. Plaintiffs' counsel took a leading role in the Superior Court proceedings, including work on proposed orders and protocols with respect to the fire scene, artifacts, the evidence warehouse and preliminary discovery. The interests of these plaintiffs were also represented in this Court with respect to the issue of federal jurisdiction. Counsel filed memoranda of law opposing federal jurisdiction and participated in conferences and hearings conducted by this court.

² These defendants first filed a Motion to Dismiss based upon the same grounds in the *Passa, Sweet, Guindon* and *Roderiques* cases on April 30, 2004.

Plaintiffs filed their motion for leave to file an Amended Master Complaint on November 23, 2004, approximately two weeks before the scheduled hearing on motions to dismiss. As plaintiffs set forth in their memorandum in support of the motion to amend, the proposed amendments as to these defendants are as follows:

- “...8. Adding breach of warranty counts to all product liability defendant sections...
- 13. Clarifying Foamex International, Inc. count to allege only successor liability...
- 15. Adding factual detail to foam defendants’ counts.”

(Plaintiffs’ Memorandum at p. 5).

These proposed amendments are futile as to Foamex and General Foam. They are also untimely. Thus, Foamex and General Foam object to the motion to amend and request that it be denied. Alternatively, these defendants request that this Court hear the motion to amend concurrently with the scheduled motions to dismiss or defer hearing until after the motions to dismiss the Complaint have been decided.

I. BACKGROUND

Foamex and General Foam have moved to dismiss the Complaint. The reasons compelling dismissal have been set forth at length in the opening memoranda and reply memoranda of law filed by these defendants in support of the motions. It is not the intention of this memorandum to reargue the reasons for dismissal. For purposes of this objection, Foamex and General Foam incorporate by reference their opening memoranda and reply memoranda in support of their motions to dismiss in this matter.

By way of summary, these defendants deny the allegations asserted against them in the

Plaintiffs' Complaint. Assuming their truth for the purposes of argument, however, the allegations establish that Foamex and General Foam owed no legal duty to Plaintiffs under Rhode Island law. Further, the Station fire was proximately caused by the negligence of parties other than these defendants, and any alleged negligence by them is too far removed from the fire - legally and factually - to be part of the proximate causation chain. The negligent and illegal acts that occurred after the alleged remote production of the foam, taken individually or all together, are legally sufficient to sever the causal connection of Foamex and General Foam to the fire. Even assuming these intervening acts of other parties did not sever the causal chain between these defendants and Plaintiffs' injuries and deaths, Foamex and General Foam cannot be liable to Plaintiffs. These defendants were bulk suppliers of non-defective foam to others who fabricated and altered the foam for countless end uses unknown to Foamex and General Foam. For these reasons, Foamex and General Foam are entitled as a matter of law to have the claims against them dismissed with prejudice. Nothing in the proposed amendments change that result.

II THE PROPOSED AMENDMENTS RELATING TO FOAMEX AND GENERAL FOAM ARE FUTILE.

This Court has recognized that it may deny leave to amend where it finds the amendments to be futile. Almeida v. United Steel Workers of America International Union, AFL-CIO, 50 F.supp.2d 115, 120 (D.R.I. 1999). In Almeida, this Court stated that although it was "...mindful that the Rules command that 'leave [to amend] shall be freely given when justice so requires' ...Fed.R.Civ.P. 15(a)...the rules do not require the Court to carry a rubber stamp.

“The legal standard for determining the futility of an amendment is the same as that applied to a motion to dismiss for failure to state a claim. Futility means that the Complaint, as amended, would fail to state a claim upon which relief could be granted. Id. Citing Glassman v. Computer Vision Corp., 90 F.3d 617, 623 (1st Cir. 1996). For the reasons set forth in support of Foamex and General Foam’s motions to dismiss, the Complaint fails to state a claim upon which relief could be granted. Because the Complaint, as amended, would also fail to state a claim upon which relief could be granted, the motion to amend should be denied.³

Plaintiff’s proposed Amended Complaint adds only one additional count, breach of warranty, against General Foam.⁴ It is clear under Rhode Island law that the rights of these defendants to dismissal is unaffected by the addition of a claim for breach of warranty. Breach of express and implied warranty claims against a product manufacturer require proof that a defect attributable to the manufacturer was the proximate cause of plaintiff’s injury. Simmons v. Lincoln Electric Co., 696 A.2d 273, 274-75 (R.I. 1997). See also Scittarelli v. Providence Gas Co., 415 A.2d 1040, 1046 (R.I. 1980) (recognizing same with respect to defect).

³ The circumstances of this case may warrant the application of a more rigorous standard of review to the motion to amend because the motions to dismiss of Foamex and General Foam were pending before the Court at the time plaintiffs’ motion to amend was filed. The Court might consider granting the motion to amend only if the amendments are supported by “substantial and convincing evidence”. Resolution Trust Corp. v. Gold, 30 F.3d 251, 253 (1st Cir. 1994). Although this Court recognized in Almeida that the Gold standard has only been applied “‘where the motion to amend is made after a defendant has moved for summary judgment,’” Almeida, 50 F.supp2d at 120 (quoting Glassman, 90 F.3d at 623), the facts in Almeida were different from those presently before the Court. The defendants in Almeida did not file their dispositive motion until after the motion to amend was filed. Here, the motions to dismiss were filed before the motion to amend.

⁴ The claims against Foamex have been amended to allege only a claim for successor liability.

Similarly, the Rhode Island Supreme Court has held that product liability defenses set forth in the Restatement (Second) of Torts are equally available in the context of breach of warranty claims arising from an alleged product defect. Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 783 (R.I. 1988). Accordingly, for the reasons set forth in Foamex and General Foam's memoranda in support of their motions to dismiss, the proposed Amended Complaint fails to state a claim upon which relief can be granted on the theory of breach of express or implied warranty. Therefore, the proposal to amend the Complaint to add counts based on breach of warranty would be futile and the motion to amend should be denied.

With the exception of the breach of warranty claims, the proposed Amended Complaint adds no new claims against Foamex and General Foam. As plaintiffs admit in their memorandum in support of the motion to amend, they add only "...factual detail to the foam defendants' counts." (Plaintiffs' Memorandum at p. 5). This additional factual detail appears to be set forth primarily in the strict liability counts. It is interesting that plaintiffs refer to these amendments as "factual detail" and not factual allegations. Stated simply, they are not well-pleaded factual allegations and should not be considered by the Court. In Glassman, 90 F.3d at 628, the First Circuit Court of Appeals stated as follows:

"In deciding a motion to dismiss under Rule 12(b)(6), [we] must take all well-pleaded facts as true, but [we] need not credit a complaint's 'bald assertions' or legal conclusions." (citations omitted).

The so-called factual detail set forth in the various strict liability counts amount to nothing more than outrageously bald assertions which add nothing to the basic strict liability

counts set forth in the original complaint. To the extent that plaintiffs' additional "factual detail" is not a bald assertion of fact, it is legal conclusion. For example, in Count LVIII which alleges strict liability against General Foam Corporation, paragraph 569 (D) of the proposed Amended Complaint alleges the following:

- "D. It was manufactured, sold, marketed and distributed without any necessary product stewardship.
1. There was a need for defendant General Foam to follow "product stewardship" practices in order to insure that hazardous products would not be used in an environment that would be a high risk to the public.
 2. Product stewardship is a widely used practice that follows the use of raw materials, intermediate products and final goods through the design, manufacture, marketing, distribution, use and disposal to insure proper application and use in order to protect the public.
 3. General Foam had to be satisfied that its foam plastic product was going to be used in a safe application before it sold it.
 4. In order to provide a product that meets the physical and safety needs of the occupancy and manner in which it will be used, it is essential that foam producers be fully aware of all of the possible and potential applications of the foam that they produce."

These allegations should not be considered by the Court because, not only are they legal

conclusions, they allege a principle that has not been recognized under Rhode Island law.⁵

III. THE PROPOSED AMENDMENT AS TO THESE DEFENDANTS SHOULD NOT BE ALLOWED ON THE EVE OF HEARING ON THE MOTIONS TO DISMISS.

Plaintiffs' proposed amendment comes on the eve of hearing on the motions to dismiss. The First Circuit has held that undue delay caused by a party seeking amendments may be a sufficient basis for denying leave to amend. Acosta-Mestre v. Hilton International of Puerto Rico, 156 F.3d 49, 52 (1st Cir. 1998) (Additional four months of discovery and 12 month delay of trial found sufficient to deny amendments where plaintiff should have been aware of the appropriate parties when filing the initial complaint or should have moved earlier to add defendant). Here, plaintiffs have moved to amend their complaint not only after dispositive motions had been filed, but after those motions were scheduled for hearing. As to these defendants, the amendment adds only one additional count - Breach of Warranty - which does not change either the court's analysis or the end result that plaintiff's claims against Foamex and General Foam should be dismissed. Beyond that, there are no additional well-pleaded facts alleged in the Amended Complaint that would affect the motions to dismiss.

Significantly, plaintiffs do not raise the subject matter of their proposed amendments for the first time in this motion to amend. The warranty claim and the "new" factual details were raised in plaintiffs' opposition to the motions to dismiss. Plaintiffs' opposition

⁵ Product stewardship claims were alleged in the Sweet Complaint (see p. 13, Count V, para. 64(f) of the Complaint). Hearing on Foamex and General Foam's motions to dismiss in Sweet have been consolidated for hearing with the instant case. Therefore, this allegation is already before the Court.

memorandum gave notice of their intent to amend the complaint to add a warranty claim. Further, the arguments set forth in plaintiffs' memorandum and the supporting affidavits presented the same conclusory allegations regarding product stewardship duties and foreseeability of the multiple intervening acts that they now seek to incorporate into the Amended Complaint. Foamex and General Foam countered these allegations in their reply memoranda, not on the basis that they were not part of the Complaint, but rather on their merits (or lack thereof). Therefore, the proposed Amended Complaint will add nothing to the arguments already presented by the parties and now pending before the Court. The only effect of allowing the amendment will be to delay this Court's resolution of these motions.

IV. CONCLUSION.

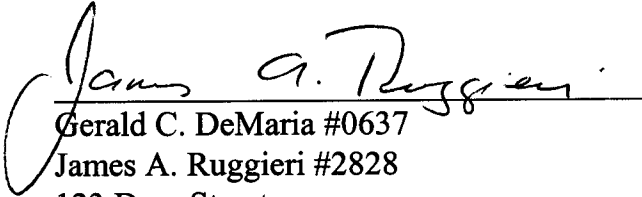
The proposed amendment fails to state a claim upon which relief could be granted. Accordingly, it is futile and the motion to amend should be denied. In the alternative, as the Court decided in Almeida, because the legal standard for determining the futility of an amendment is the same as that applied to a motion to dismiss for failure to state a claim, this court should consider the causes of action presented by both the original Complaint and the Amended Complaint instead of treating the motion to amend and the motion to dismiss separately, on December 9, 2004. As a further alternative, the Court may defer consideration of plaintiffs' motion to amend until after hearing on the motions to dismiss since, for the reasons discussed above, resolution of the motions to dismiss will be dispositive of the motion to amend as it relates to these defendants.

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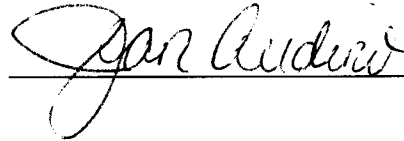
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